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No. 04-165

IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., *et al.*,
Petitioners,

v.

DON C. KENNARD AND HARROLD E. WRIGHT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF

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REPLY BRIEF

In making their plea for "original source" status, respondents Kennard and Wright embrace the very aspects of the Tenth Circuit decision that conflict with other circuits' interpretation of the "direct . . . knowledge" requirement of 31 U.S.C. § 3730(e)(4). Respondents go on for page after page reciting facts that are intended to show, in the words of the Tenth Circuit, the "character of the relator[s'] discovery and investigation" and their "independent investigation, deduction, and effort." Pet. App. 10a, 14a. But only in the Tenth Circuit would these considerations suffice to qualify respondents as an "original source." The colorful details set forth in the brief in opposition cannot obscure the fact that respondents have *no* direct personal knowledge of any aspect of the allegedly fraudulent conduct that they claim violates the False Claims Act ("FCA"), a fact which would have ended the case had it been decided in the Second, Eighth, Ninth, or D.C. Circuits, rather than the Tenth.

The Second, Eighth, Ninth, and D.C. Circuits have held that personal, firsthand knowledge of the fraud itself is necessary to qualify as an "original source." In these circuits, no amount or quality of investigative labor (of any "character") can substitute for personal, firsthand knowledge of the actual fraud that forms the basis of the alleged FCA violation. These circuits recognize that such "direct" knowledge is gained by having "s[een], heard, or touched" the allegedly fraudulent conduct, Black's Law Dictionary 413 (5th ed. 1979), generally by "individuals who are close observers or otherwise involved in the fraudulent activity," S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. Respondents concede that the Tenth Circuit has no such requirement, and the existence of a circuit conflict is thus clear.

1. Although respondents contend that the Tenth Circuit's opinion was "much more nuanced and careful than Comstock admits," Opp. 17, they do not disagree with Comstock about the content of the Tenth Circuit's "original source" test. As respondents themselves acknowledge, the Tenth Circuit held that they met the statute's "original source" requirement because "it was only through independent investigation, deduction and effort that Relators discovered the alleged fraud." *Compare* Pet. 14 *with* Opp. 17. As Comstock demonstrated in its petition, the Tenth Circuit adopted an amorphous totality-of-the-circumstances inquiry that examines the "character" of the "investigation, deduction, and effort," none of which has the least bit to do with whether a relator has personal or firsthand knowledge of the fraudulent conduct at issue. Indeed, the Tenth Circuit's approach collapses the distinction between the two quite separate requirements of the statutory "original source" test: "direct and independent knowledge." In the Tenth Circuit, a relator can qualify as an original source by demonstrating "*independent* investigation, deduction and effort," Pet. App. 14a (emphasis added), even if the relator lacks *direct* knowledge of the allegedly fraudulent conduct that forms the basis of the relator's FCA complaint.

The Tenth Circuit was perfectly clear on this critical point, emphasizing not once but three separate times that "[k]nowledge of the actual fraudulent conduct is not necessary"; that "[a] 'relator need not . . . have in his possession knowledge of the actual fraudulent conduct itself'"; and that relators need not possess knowledge of "the actual alleged fraudulent submissions to the Government," Pet. App. 9a-10a (quoting and citing prior Tenth Circuit decisions). The Tenth Circuit has thus severed the original source inquiry from any requirement of direct personal knowledge of the actual fraudulent conduct that allegedly

violates the FCA. As demonstrated in the petition for certiorari, and as will be further elaborated *infra*, that is the precise way in which the Tenth Circuit conflicts with the decisions of the other courts of appeals.[1]

2. Respondents' effort to explain away this circuit conflict fails. As respondents would have it, a circuit conflict over the meaning of the "original source" test is simply not possible because the test is "highly fact-specific" and "[i]n no two *qui tam* cases will either the amount, character or source of the information possessed by the relator be the same." Opp. 19. But respondents do not contest that the Second, Eighth, Ninth, and D.C. Circuits apply a legal test that differs from the one the Tenth Circuit has adopted. These circuits interpret the "direct" knowledge standard in § 3730(e)(4) to require personal, firsthand knowledge of the fraudulent conduct that forms the basis of the FCA violation alleged in the relator's complaint. *See, e.g.*, *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("A relator is said to have direct knowledge of fraud when he 'saw [it] with his own eyes'") (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992)) (alteration in original); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("In order to be 'direct,' the information

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[1] Wright has argued elsewhere that, under the Tenth Circuit decision, "logical speculation" may qualify a relator as an original source. *See* Relator Wright's Surreply to Reply of Exxon Company USA and Exxon Corporation in Support of Defendants' Motion to Dismiss for Lack of Jurisdiction at 5, *United States ex rel. Wright v. Chevron, USA, Inc.*, No. 5:03-CV-264 (E.D. Tex. filed Aug. 5, 2004). "[L]ogical speculation" is a far cry from "firsthand knowledge."

must be first-hand knowledge."); *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1999) (holding that "direct" knowledge requires a relator to "show that he had firsthand knowledge of the alleged fraud"). Respondents cannot point to a single case in which any of those circuits has permitted a case to proceed – as the Tenth Circuit did here – in the absence of such personal, firsthand knowledge. There is little question, therefore, that had this case been brought in the Second, Eighth, Ninth, and D.C. Circuits, the complaint would have been dismissed. *See generally* Pet. 11-12, 16-18.[2]

Instead, respondents seek to distinguish the cases from these circuits on their facts, but respondents' descriptions are rife with mischaracterization. For example, they assert that *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994), helps their cause. But the relator in that case had personal knowledge of the fraud – alleged overbilling by an arbitrator – because the relator had participated directly in the arbitration and knew that work billed had not been performed. The relator was actually a percipient witness to aspects of the fraudulent conduct alleged in the relator's FCA complaint and thus had personal knowledge of an aspect of the fraud, in direct contrast to relators here.[3]

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[2] Respondents also ignore the district court decisions cited in the petition that split in applying either a firsthand knowledge or "sufficient investigation" standard to relators' claims. *See* Pet. 21-22 (discussing cases).

[3] Respondents actually use ellipses to *edit out* the portion of the holding discussing personal knowledge. *Compare Springfield*, 14 F.3d at 657 (discussing relator's "personal knowledge of the arbitration proceedings") *with* Opp. 19 (editing out same quote). Despite respondents' effort to sow confusion, the D. C. Circuit has

Respondents' analysis of *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995), is similarly misleading. In that case, Priem (the relator) did indeed talk to witnesses, although there is no evidence that the witnesses were aware of the fraud in the submitted payroll reports. The core of the *qui tam* action was thus based on Priem's investigation at the worksite and his review of public documents. Even though Priem could be said to have "ferreted out" the alleged fraud, the Eighth Circuit held that Priem's knowledge was not "direct" because it was not firsthand, that is, Priem did not "s[ee it] with his own eyes." 44 F.3d at 703. The Eighth Circuit's holding in *Barth* is directly at odds with the Tenth Circuit's decision here.[4]

In all events, whatever factual distinctions there might be among these cases, the legal test these circuits employ conflicts directly with the test the Tenth Circuit adopted and

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left no doubt that a relator must possess firsthand knowledge of the alleged fraud. *See Findley*, 105 F.3d at 690; Pet. 18-19.

[4] In *Aflatooni*, the relator conducted a investigation into allegations of Medicare fraud aided by his experience in the medical field; he reviewed documents and interviewed witnesses about the information contained therein, and had personal knowledge of lax auditing procedures that could have facilitated the fraud. Yet the Ninth Circuit concluded that, these efforts aside, the relator's allegation of actual fraud was based on "speculation." 163 F.3d at 526. Respondents miss the forest for the trees by discussing two particular facts, but omitting the central holding: that "because the purpose of the FCA is to encourage individuals with true 'knowledge' of alleged wrongdoing to come forward and provide such information to the Government, the purposes of the Act would not be served by allowing a relator to maintain a *qui tam* suit based on pure speculation or conjecture." *Id.* In the Ninth Circuit, it is clear that the "character" and "effort" of investigation cannot save a complaint based on "speculation."

applied in this case – and that difference is outcome determinative because respondents lack direct personal knowledge of any aspect of the fraud alleged in their complaint.

3. Because the circuit conflict over the meaning of "direct" knowledge in § 3730(e)(4) is so clear, respondents expend most of their effort trying to establish that they have sufficient personal, firsthand knowledge to qualify as an original source under the test that prevails in most circuits. That effort is misconceived. Respondents do not assert that they have the kind of personal, firsthand knowledge that matters for purposes of § 3730(e)(4) – *i.e.*, knowledge of the actual fraudulent conduct that they allege in their FCA complaint. What respondents seek to demonstrate is that they have personal, firsthand knowledge of the specific facts alleged in their complaint, from which they have speculated that a fraud may have occurred. But none of those facts amounts to direct knowledge of any aspect of the fraudulent conduct respondents allege in their complaint. And the latter kind of knowledge is what qualifies as "direct" knowledge for purposes of § 3730(e)(4).[5]

Respondents' expanded narrative in the brief in opposition simply adds details of secondhand information and speculation: the unnamed General Counsel of the Texas

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[5] The "word 'information' refers to any essential element of the fraud transaction[.]" *Findley*, 105 F.3d at 690. Relators have no firsthand knowledge of any essential element of the alleged fraud. Merely asserting firsthand knowledge of some facts in the complaint, no matter how collateral, is plainly insufficient; the entire "direct and independent knowledge" requirement would be toothless if relators could meet it by asserting that they have direct knowledge of facts from which they speculate that a fraud has occurred.

General Land Office ("GLO") interpreting the meaning of the notation "EXPIRED," Bob Armstrong informing Kennard that the Mineral Management Service was "completely clueless," Pat Holloway (the counsel of record) "explain[ing]" to Kennard that royalty clauses in GLO leases differ from those in MMS leases. Opp. 10-11. None of those constitute firsthand knowledge of the alleged fraud.

Respondents also contend that Wright had direct knowledge because he allegedly noticed that his own royalty payments had dropped when Comstock began operating his wells. Even the Tenth Circuit recognized that inferring fraud by Comstock against the Tribe based on Wright's personal experience amounted to "speculat[ion]." Pet. App. 2a. Wright's leases covered wells that were not on the Reservation, and the leases were not federal leases at all. Wright had no knowledge of Comstock's practices with respect to the Indian Leases, no knowledge that Comstock was using "the same royalty pricing standards or methods" to calculate both his royalties and that of the Tribe, and no knowledge of any reduction in lease payments to the Tribes. Opp. 8. Information about Wright's own lease payments had nothing at all to do with Comstock's payments to the Tribe, and Wright's allegations of fraud were thus based on a series of inferences (about pricing methods, among many other things) without any factual basis. His "knowledge" of the fraud is entirely *indirect*, nothing more than guesswork.

Respondents' contention that they obtained "direct" knowledge by seeing the MMS-2014 forms, which reported the royalty payments to the Tribe, is a red herring. They did not discover the MMS-2014 forms by their own efforts; instead, as Holloway's affidavit states, they learned of the forms the Tribe gave to Holloway, who in turn showed them to Kennard and Wright. *See* Appendix to Brief of Appellants

Kennard and Wright at 187-88 (10th Cir. filed Mar. 24, 2003) (Holloway affidavit). The knowledge from those forms is thus *secondhand* and *indirect*, because respondents received the information through at least two intermediaries (Holloway and the Tribe). Information handed to a relator by a third party obviously cannot be used to satisfy the "direct" knowledge requirement, which is no doubt why the affidavits of Kennard and Wright submitted to support their status as relators makes no mention at all of any MMS-2014 forms. *See* Pet. App. 37a-68a. That is also no doubt why the Tenth Circuit's decision makes no mention of the MMS-2014 forms and holds that respondents' own investigation into the publicly available documents and Wright's own statements were sufficient to constitute "direct" knowledge. It is that aspect of the Tenth Circuit decision that is in conflict with other circuits and merits this Court's review.[6]

4. Respondents also spend substantial space justifying the Tenth Circuit's conclusion that they deserve relator status because they "ferreted out" the alleged fraud. This argument ignores the critical fact that the alleged fraud had already been publicly disclosed at the time the suit was filed, and, indeed, that the "original source" inquiry is never even reached unless the alleged fraud has been publicly disclosed

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[6] Respondents' discussion of the "expired" stamp on the state lease files suffers from the same deficiency. As both the opposition and the affidavits make clear, Kennard's allegations about the significance of the stamp came secondhand from the GLO General Counsel. *See* Opp. 9-10 (citing the detailed descriptions provided by the General Counsel); Pet. App. 41a-42a, ¶¶ 12-13 (same). Moreover, those documents were in the public domain, available to any researcher diligent enough to find them. Kennard's review of the public lease files thus did not constitute the sort of inside, personal knowledge that Congress required in the FCA.

by the time that relators file their suit. Congress accommodated the interest in ferreting out fraud by placing relatively few restrictions on a relator's ability to bring a *qui tam* action prior to public disclosure. An action at that time may rely on speculation, secondhand information, public documents, and independent investigation. Congress sensibly determined, however, that the balance changes once public disclosure occurs and the federal government can investigate the fraud by relying on the public disclosure. After all, the purpose of the FCA is to combat fraud on the federal government; the *qui tam* provisions rewarding relators are merely a means to that end. Once the alleged fraud has been publicly disclosed, the federal government has no need to share a potential award with relators lacking any firsthand knowledge, who, precisely because they lack personal knowledge, can add nothing as witnesses or insiders to bolster the government's case.

5. Respondents' final argument that there are alternative grounds to affirm the jurisdictional holding of the Tenth Circuit below is meritless. *See* Opp. 26-27. Respondents fully litigated, and lost, the question of whether their complaint was based upon a public disclosure. *See* Pet. App. 4a-8a. They have not filed a cross-petition from that adverse ruling and have not set forth any reason to believe that the Tenth Circuit decision affirming the district court on those issues was in any way erroneous. Indeed, any respondent could make vague and conclusory suggestions that other grounds justified the result below, and such allegations cannot suffice to justify a denial of review. Petitioners' alternative arguments were correctly rejected below, and are no bar to granting the petition to resolve the "direct . . . knowledge" conflict.

Accordingly, the petition should be granted.

Respectfully submitted,

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